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ALEXANDER L. STEVAS,
CLERK

84-1965

No.: _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

WILLIE H. CHRISTIAN

Petitioner

v.

VETERAN'S ADMINISTRATION

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

WILLIE H. CHRISTIAN
707 N. Jefferson Ave.
Clearwater, FL 33515
(813) 461-3433

66 pp

QUESTIONS PRESENTED

1. Whether the Veterans Administration's Central ffice (VACO) written contract that was signed by Petitioner o become a trainee was legally binding upon the VACO ccording to VA Regulations and the VA Training Program anual for Accountants (TP-04), Section 2.07(a).

2. Whether the Veterans administration Medical Center's VAMC) interference into the written contract Petitioner had igned with the VACO, was merely an independent action by the AMC, or was this a "plan" to use adverse action instead of legitimate reduction-in-force (RIF) constitutes a iolation of the Equal Protection Clause of the Fourteenth mendment to the Constitution of the United States.

3. Whether the Presiding Official of the Merit System rotection Board (MSPB) was judicially responsible in her onduction of the hearing with her statements concerning etitioner's RIF:

(a) "Although, it was incorrect for the agency

(VAMC) to place Petitioner in the same competitive level with Rubenstein, Petitioner would have been RIFed anyway."

(b) "There was no shortage of funds overall, there was a shortage of funds for Accountant Trainees", and a shortage of funds existed only because the agency had decided to discontinue funds."

4. Whether the MSPB, with a wide range of authority granted to that agency by the U. S. Congress guilty of negligence in the performance of their duty, by denying Petitioner redress in the system, while confirming the presiding Official's decision to affirm the Veterans Administration's position on RIF procedures constitutes a violation of Title VII of the Civil Rights Act of 1964, and the Fourteenth Amendment of the U. S. Constitution.

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VETERAN'S ADMINISTRATION

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Federal Circuit and the Merit System Protection Board appear in the Appendix hereto.

JURISDICTION

On 12 February 1985, the court of Appeals entered judgement affirming the action of the Merit System Protection Board (MSPB) against him (Appendix 1). The jurisdiction of this court is invoked under Title 28, United States Code, Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment XIV, §1

All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 703(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. {2000e-2(a).

(a) It shall be an unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual with respect to his compensation, terms, conditions or privileges of employment because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such individual's race, color, religion, sex, or national orgin.

The Civil Service Reform Act of 1978

STATEMENT OF THE CASE

On 19 September 1982, a Letter of Reduction-in-Force (RIF) was issued to Willie A. Christian by the Veterans Administration Medical Center (VAMC) of Bay Pines, FL.

A timely petition for an initial hearing was filed with the MSPB, pursuant to Section 5 USC 1205, and a decision was issued on 19 July 1983. The MSPB affirmed the demotion by RIF of Petitioner, and a timely Petition for Review was filed on 18 August 1983 with the MSPB.

Petitioner's complaint for review was based on a Personnel Action (adverse action) lodged against me by the VAMC at Bay Pines.

The MSPB Review Board affirmed the initial decision of the Presiding Official of the MSPB in favor of the VAMC. Their reasoning was that the case didn't come under their guidelines for review.

The Federal Court was petitioned on 24 April 1984 for review of the RIF based on adverse action, breach of contract, refusal of MSPB Review board to apply corrective action to Presiding Official's incorrect interpretation of the Office of Personnel Management (OPM) Regulations, etc.

On 12 February 1985, the United States Court of Appeals for the Federal Circuit affirmed the MSPB without comment.

ARGUMENT

1. **Whether the Veterans Administration Central Office (VACO) contract that was written in VACO and signed by Petitioner meets all of the five (5) essentials that creates an obligation binding upon the Parties and enforceable by law.**

In United States and English law, the essentials of a contract are: (1) mutual assent; (2) legal consideration; (3) parties to be of legal capacity to make a contract; (4) absence of fraud or duress; (5) subject matter that is not illegal or against public policy.

Petitioner had completed his obligation as specified in the contract when VACO gave the VAMC permission to start another training program. Under VA Regulations, if a trainee hasn't been assigned to another station - then VACO will give the trainee a choice of three (3) localities, of which, the trainee has to choose one. The trainee forfeits all claims against the agency if a choice is not made. Since the agency didn't abide by its own regulations, a

breach of contract still exists between Petitioner and VACO.

A statement was made by my attorney to the United States Court of Appeals for the Federal Circuit:

"Since Christian had not been able to find an appropriate Grade GS-7 or GS-9 position himself, he should have simply been reassigned to a GS-7 or 9 position at one of the other 171 stations if there was no Grade GS-7 position at Bay Pines. The agency's own failure to place Chiristian after he completed training, through a directed reassignment if necessary, was the origin of the RIF. Petitioner submits that the RIF procedures are not properly available in such circumstances.

In fact, the OPM guidelines suggest the reverse even when an agency anticipates a legitimate RIF, agency managers may assign career employees out of the unit where the RIF is planned into vacancies elsewhere, to minimize the impact of the RIF (FPM, Ch. 351, App. b, Para. B-4). Instead of RIFing to avoid reassignment, the VA should have reassigned Christian to avoid the RIF impact.

The VA Training Program for Accountants itself makes clear that demotion or separation of employees in the training program is appropriate only where there are

"problems relating to an intern's aptitude, attitude or abilities." (Section 2.07(b). This is not the situation here because according to Kuzma, Chief of the VAMC Fiscal Service, Christian's performance ratings were very good and he got along well with his fellow employees and supervisors."

2. **Whether the Veterans Adminstration Medical Center's (VAMC) intrusion into the written contract of Petitioner and VACO constitutes a violation by a third party, or was the VAMC simply instituting a course of action (plan) to move Petitioner (incumbent) out of the training program and putting another employee (Rubenstein) from Research Service into the training program without first getting Petitioner reassigned.**

The Reduction-in-Force (RIF) was not legitimate, as it limited Petitioner's scope of participations when reassignment was considered. The VAMC limited Petitioner's reassignment participation to the Medical Center at Bay Pines, FL, and the Veterans Adminstration Regional Office (VARO) at St. Petersburg, FL.

When RIF was contemplated by the VAMC, Personnel Service should have followed the guidelines of the Office of Personnel

Management according to Section 3502 of Title 5 of the United States Code.

(a)"158. Demotion or failure to promote

As general matter, government employee has no property entitlement to promotion and therefore lacks any constitutional basis for requiring some kind of hearing upon nonpromotion decision; there may, however, be situations where such entitlement would exist as where promotion would be virtually matter of right - for example, where it was solely function of seniority or ties to other objective criteria or where there is "common law" of promotion sufficient to create de factor right to promotion. Colm v. Vance (1977) 186 App DC 132, 567 F2d 1125."

(b) "Continuing contract status" does not encompass requirement that good cause must be shown for reassignment to lower position. Wooten v. Clifton Forge School Bd. (1981, CA4 Va) 655 F2d 552."

3. Whether the Presiding official of the Merit System protection Board (MSPB) was qualified to conduct hearing of this magnitude, and did she have the qualifications desired to detect perjured testimony.

Petitioner respectfully suggests that in the appendix to the brief that my attorney submitted to the United States court of Appeals for the Federal Circuit - a conflict of testimony was discovered by petitioner when reviewing the various documents for inclusion in my Writ of Certiorari. Personnel Service's written response to the Presiding Official of the MSPB inquiry on my accusations in my charge statement was somewhat different from that of Ronald Kuzma's statement when questioned by Mr. Dawson and Ms. Claudia Tesoro of the MSPB regarding the anticipated RIF of Bernard Rubenstein when he was in Research Service before being accepted in the accounting training program (App. pp. 12-13).

The testimony suggests that Personnel Service told Ms. Tesoro they know nothing of an anticipated RIF that was about to happen.

The following are excerpts from the conflicting testimony of the Personnel Service, Bay Pines, FL, in their response to the MSPB in A-13 and A-14. The transcripts are questions directed at Mr. Ronald Kuzma, Chief, Fiscal Service, Bay Pines, FL:

(a) "Finally, in August 1982, after Mr. Christian had been in the trainee position for two years, the decision was made to proceed with a reduction-in-force in order to move him out of the Accountant Trainee position and place him into a permanent position in the Fiscal Service.

Mr. Christian raised the issue that a Research employee had been "RIFed" into the Accountant Trainee position. This is not the case. As outlined above, Mr. Rubenstein who was originally in our Research Service was placed into this position under our Merit Promotion Plan.

Mr. Christian has also raised the issue that this RIF action was taken because of his race. In response to

this statement, it can only be said that Mr. Christian's race had absolutely nothing to do with this decision."

"BY MR. DAWSON: (Trial Transcript 62-19:65-9)

Q Let me go, if I may, back to Mr. Rubenstein for a moment. I take it that you interviewed Mr. Rubenstein in much the manner that you did Mr. Christian at the time that he came into the Department, is that right?

A Yes, I'm sure I did.

Q Can you recall where it was that Mr. Rubenstein was working at that point in time?

A I believe at that time he was working in Research.

Q Research where?

A At Bay Pines.

Q Do you know what GS rank he had while he was working in Research?

A If I remember correctly, he was classified as a GS-7.

GS-7?

A Uh-huh.

Q And do you know —

THE REPORTER: You have to speak up.

MR. DAWSON: I'm sorry. Generally, I speak too loud, I apologize.

BY MR. DAWSON:

Q Do you know if he was about to be reduced in grade at the time that he made application for the training program in your shop?

A He was not reduced in grade, to my knowledge.

PRESIDING OFFICIAL TESORO: Well was some other action about to happen to him?

MR. DAWSON: Yes, you say that as if something was about to happen.

THE WITNESS: Yes.

BY MR. DAWSON:

Q Thank you very much. Tell us about that, if you would.

A Well it was my understanding there was a reduction in force to reduce a position and his position was the one that was being reduced, but I don't think it had anything to do with Mr. Rubenstein's grade, as far as I know.

Q But whatever it meant to him, and I'm not quite sure

of that, but his position in the Research Department was about to become the calamity of a reduction in force in that Department, is that right?

A Well I wouldn't put it that way, I don't know if it was a calamity.

Q Well to some people it's a calamity to experience a reduction in force.

A I suppose so.

MR. PARKER: Excuse me. I know that hearsay is ermitted, but I think we're going a little bit overboard.

e has nothing to do with the Research facility.

PRESIDING OFFICIAL TESORO: That's not a hearsay bjection, you're overruled.

Y MR. DAWSON:

Q Do you know what that would have meant for Mr. Rubenstein. When they reduce it, a reduction in force was going to get rid of his position, they were going to rid of him, he was going to be out totally, he wasn't going to be reduced in grade, he wasn't going to have no

job at all unless he found one someplace.

A That could be, I don't know what was going on over there.

Q Did that play any part in terms of your decision to bring him into the program?

A No, it really didn't. At the time, he was the best qualified person that I had to apply at that time. (Balance of answer inaudible.)"

4. **Did the MSPB and the Special Counsel abide by their rules of authority and responsibilities as set forth by the Laws of the 95th Congress in Chapter 12 of the Civil Service Reform Act of 1978.**

The Special Counsel's office abdicated its duty to check on the prohibited personnel practices of the VAMC at Bay Pines, FL, by stating that the MSPB would handle the complaint. The MSPB didn't do their job as required by law under Chapter 12 of the Civil Service Reform Act of 1978, Title VII of the 1964 Civil Rights Act, and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

CONCLUSION

The Petitioner, Willie H. Christian, respectfully prays that a Writ of Certiorari be granted, to review the judgement of the United States Court of Appeals for the Federal Circuit entered on 12 February 1985.

STATEMENT OF UNDERSTANDING

I understand that the Veterans Administration, Department of Medicine and Surgery, Training Program for Accountants is for the purpose of developing qualified employees to meet the department's needs in the field of accounting and fiscal administration.

Accordingly, I understand that my assignment after successful completion of training will be made in the Department's interest, and that, while my preferences will be considered when administratively feasible, I will be expected to accept assigment at any DM&S station in the continental United States where my services are needed.

I further understand that this training program is an integral part of a management development system designed to provide through the progressive development of career employees, for the ongoing replenishment of qualified personnel in key administrative and management positions in DM&S and the VA.

Accordingly, I understand that upon successful completion of training, I will be enrolled in the VA Management Personnel Inventory and will be expected, with supervisory assistance, to plan and execute self-development activities progressively throughout my career.

"WILLIE H. CHRISTIAN"
Signature of Intern

"August 6, 1980"
Date

REPRODUCTION OF LETTER TO MSPB:

CHRISTIAN, WILLIE H.
Case Number: AT03518211348

October 19, 1982

Ms. Claudia Tesoro
Presiding Official
Merit Systems Protection Board
Atlanta Regional Office
176 Peachtree Street, N. W.
Atlanta, GA 30309

Dear Ms. Tesoro:

Enclosed is the material your office requested in response to the Order for the Agency to Respond and Appellant to Prosecute, in the case of Willie H. Christian, Appellant, vs Veteans Administration, Agency, Case Number AT03518211348.

The specific material you requested has been provided with exception of the following:

Item 3: Mr. Christian did see an EEO Counselor concerning an informal complaint of discrimination; however, according to him, he has not filed a formal complaint of discrimination.

Item 4: As a result of the above, Item 4 is not applicable.

Item 6: Mr. Christian's notice of reduction-in-force was personally handed to him by his supervisor on August 16, 1982. We have no written evidence of this event.

Item 9: No employees with lower retention standing than the appellant were retained in the competitive level.

Following the Table of Contents in the enclosed case files, and just in front of Tab A, you will find a certification that all copies provided are true and correct copies and a certification that two copies of the case file have been

provided to Mr. Christian.

Sincerely yours,

RICHARD F. McELLIGOTT
Director
Medical Center

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516/05

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Trainee position

TAB G6: Memo - Chief, Fiscal Service requesting over-ceiling position for Mr. Christian

TAB G7: Letter to Mr. Christian concerning grade retention

TAB G8: Letter to Mr. Christian concerning Priority Placement Program

August 13, 1982

Mr. Willie H. Christian
FIscal Service (04)
VA Medical Center
Bay Pines, FL 33504

SUBJ: Notice of Reduction in Force

1. As your Accountant training has been successfully completed at this station, and you have not moved to a permanent assignment, it is necessary to abolish the training position which you occupy and to reassign you within Fiscal Service at this station. In accordance with FPM Chapter 351, you will be reassigned to position number 5836, Accounting Technician, GS-525-5 in the same organization. This reassignment will take place on or about September 19, 1982.

2. If you accept the offer of reassignment to the lower graded position, you will be entitled to grade and pay

retention under the provisions of Sections 5362 and 5365 of Title 5, United States Code. As such, you will retain your current grade and step until September 18, 1984. At that point, indefinite pay retention will begin. These provisions will cease to apply if:

a. you have a break in service of one workday or more;

b. you are demoted for personal cause or at your request;

c. you are placed in, or decine a reasonable offer of a position, the grade of which is equal to or higher than your retained grade; or

d. you elect in writing to have the grade and pay retention benefits terminated.

3. The following factors pertaining to the reduction-in-force (RIF) are provided for your information:

a. The competitive area for this RIF is the VA Medical Center, Bay Pines, FL and the VA Ambulatory Care Clinic, St. Petersburg, FL. You competed only against employees at these two facilities.

b. Your competitve level contained two Accountant Trainee GS-510-7 positions.

c. Your retention subgroup is II A. The II indicates

8. Please indicate at the bottom of this letter your acceptance or rejection of this reassignment offer and return a copy to this office no later that August 18, 1982.

RICHARD F. McELLIGOTT
Director
Medical Center

Enclosure

( ) I will accept the offer of reassignment to the position of Accounting Tech GS-525-5 on September 19, 1982.

( ) I do not wish to accept the above offer of reassignment. I am giving my reasons below. I understand that I will be separated by Reduction in Force effective September 18, 1982.

RETENTION REGISTER: ACCOUNTANT (TRAINEE) GS-510-7

NAME	RETENTION SUB-GROUP	SCD
Rubenstein, Bernard J.	I-B	7-7-74
Christian, Willie H.	II-A	2-25-76

VETERANS ADMINISTRATION MEDICAL CENTER

BAY PINES, FLORIDA

AGENCY'S RESPONSE TO MATERIAL ISSUES RAISED BY APPELLANT

r. Christian has raised the following issued:

. Personnel Service changed his position series and lassification with the consent of the Medical Center Director.

. Personnel Service, with the consent of the Medical enter Director and the Fiscal Officer, placed a "RIFed" esearch employee into the Accountant Trainee position and hen "RIFed" Mr. Christian out of the position.

. Mr. Christian believes that the RIF action was done ecause of his race.

he reduction-in-force involving Mr. Christian was onducted in accordance with FPM Chapter 341. As such, Mr. hristians job series and classification were changed from ccountant Trainee GS-510-7 to Accounting Tecnician, S-525-5. This action was effective September 19, 1982. The ollowing information provides the background information eading up to this RIF.

On August 10, 1980, MR. Christian began a one-year Accountant Trainee program. At the end of this training program, it is customary for individuals to apply for and be accepted into permanent Accountant positions at other VA facilities.

On September 8, 1981, a second Accountant Trainee position was announced in Fiscal Service. This postion was announced in anticipation of Mr. Christian's leaving since he had completed his one-year training. On September 17, 1982, Mr. Bernard J. Rubenstein was selected under Merit promotion procedures for the second Accountant Trainee position.

Following Mr. Christian's training he applied for several accountant positions but was not selected for any of them. Therefore, he remained in an Accountant Trainee position.

In May, 1982, following the annual classification review of Fiscal Service, the Medical Center Director was forwarded an organization chart for this Service which depicted two accontant Trainee positions. The Director refused to sign this chart and expressed his concern that we were not authorized two trainees and efforts should be made to place Mr. Christian in a pemanent position at another facility or in another position in Fiscal Service. Meetings were held

with Mr. Christian to explain the Director's position. The action was delayed in order to give him the opportunity to be selected at another VA facility.

Finally, in August 1982, after Mr. Christian had been in the trainee position for two years, the decision was made to proceed with a reduction-in-force in order to move him out of the Accoutant Trainee position and place him into a permanent position in the Fiscal Service.

Mr. Christian raised the issue that a Research employee had been "RIFed" into the Accountant Trainee position. This is not the case. As outlined above, Mr. Rubenstien who was originally in our Research Service waas placed into this position under our merit Promotion Plan.

Mr. Christian has also raised the issue that this RIF action was taken because of his race. In response to this statement, it can only be said that Mr. Christian's race had absolutely nothing to do with this decision.

Notice to:

Mr. Charles H. Parker
Office of District Counsel
Veterans Administration
P.O. Box 1437
St. Petersburg, FL 33731

In the matter of:
Christian, Willie H.

Docket Number: AT0315182113348

The Board has received a petition for review of the initial decision of the presiding official in the above case. Section 1201.115 of Title 5, Code of Federal Regulations, provides that the other parties will be granted an opportunity for reponse to the petition. We are forwarding the attached copy of the petition to you and are providing you with the opportunity to submit any written response that you may care to make.

If you decide to respond, an original and one copy of your response must be filed with the Secretary, Merit System Protection Board, 1120 Vermont Avenue, N.W., Washington, D. C. 20419, within twenty-five (25) calendar days from the date of this Notice. A copy of your response must be sent to the petitioner and to any other parties to the appeal as

shown on the service list, and you must provide the Board with a certificate specifying how and when service was made. It shall be the duty of all parties to notify the Board and one another in writing of any changes in the names or addresses on the service list. The petitioner is hereby advised that the Board's regulations contemplate that the petition for review wil be complete when filed. There are no regulatory provisions for the acceptance of further materials submitted by the parties.

All submission and corespondence regarding this matter must make reference to the docket number

SEP 01, 1983
Date

/Signed/
ROBERT E. TAYLOR
Secretary

Attachment

Service list:

Office of Personnel Management
Attn: Appellate Policies Branch
Room 7P568
1900 E. Street, N.W.
Washington, D. C. 20415

Mr. Willie H. Christian
707 N. Jefferson Avenue
Clearwater, Florida 33515

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

WILLIE H. CHRISTIAN
V.
VETERANS ADMINISTRATION

DOCKET NUMBER
AT03518211348

ORDER

Having fully considered the appellant's petiton for review of the initial decision issued on July 19, 1983, and finding that it does not meet the criteria for review set for that 5 C.F.R. 5 para. 1201.115, the Board hereby denies the petition.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five (5) days from the date of this order, 5 C.F.R. para. 1201.113(b).

The appellant has the statutory right under 5 U.S.C.

7702 (b)(1) to petition the Equal Employment Opportunity Commission (EEOC) for consideration of the Board's final decision with respect to clains of prohibited discrimination.

The statute requires at 5 U.S.C. para. 7702 (b)(1) that such petition be filed with EEOC within thirty (30) days after notice of this decison.

If the appellant elects not to petition the EEOC for further review, the appellant has the statutory right under U.S.C. para 7702 (b)(2) to file a civil action in an appropriate United States District Court with respect to such prohibited discrimination clams. The statute requires t 5 U.S.C. para. 7703(b)(2) that such a civil action be iled in a United States District Court not later than hirty (30) days after the appellant's receipt of this rder. In such an action involving a claim of iscrimination based on race, color, religion, sex, national rigin, or a handicapping condition, the appellant has the tatutory right under 42 U.S. C. paras. 2000e5(f) - (k), and 9 U.S.C. para. 794a, to request representation by a ourt-appointed lawyer, and to request waiver of any equirement of prepayment of fees, costs, or other security.

If the appellant chooses not to pursue the discrimination issue before the EEOC or a United States District Court, the appellant has the statutory right under 5 U.S.C. para. 7703(b)(1) to seek judicial review of the Board's final decision on issues other than prohibited discrimination before the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D. C. 20439. The statute requires at 5 U.S.C. para. 7703(b)(1) that a petition for such judicial review be received by the court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

MAR 27, 984
(DATE)
Washington, D.C .

/Signed/
ROBERT E. TAYLOR
Secretary

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

WILLIE H. CHRISTIAN NO. 84-1290
PETITIONER

v. AT03518211348

THE VETERANS ADMINSITRATION
RESPONDENT

JUDGEMENT

On APPEAL from the Merit Systems Protection Board

this CAUSE having been heard and considered, if it is

ORDERED and ADJUDGED: AFFIRMED

DATED February 12, 1985 ENTERED BY ORDER OF THE COURT

George E. Hutchinson, Clerk

/Signed/
Clerk

Issued as a mandate: March 6, 1985
Costs: Against, Petitioner
Printing..... $67.04
Total..... $67.04

ANALYSIS AND FINDINGS

In Losure v. Interstate Commerce Commission, 2 MSPB 361 (1980), the Board confirmed that in RIF appeals, as in almost all other cases brought before the MSPB, the agency bears the burden of proving its case by a preponderance of the evidence. In the RIF context, this entails proving that the appellant's entitlement, or lack of entitlement, to continued employment was correctly determined by application of the RIF regulations, which are found at 5 C.F.R. part 351.

The first element of a prima facie case under Losure is "proof that the RIF regulations were properly invoked due to management considerations of the character appropriately committed to agency discretion." Id. at 366. Losure also requires proof that the governing regulations were correctly applied in the case at hand. Application of the RIF regulations entails defining the competitive area within which the RIF will take place (see 5 C.F.R. para. 351.402); grouping potentially affected employees into competitive levels (see 5 C.F.R. para. 351.403) according to their

retention standing (see 5 C.F.R. paras. 351.501-.505), thereby establishing retention registers (see 5 C.F.R. para. 351.404); deciding which employees will have to be released from their competitive level, i.e., affected by the RIF (see 5 C.F.R. paras. 351.601-.608); and determining what assignment rights to other positions affected employees might have (see 5 C.F.R. para. 351.701-.705).

Before any conclusions can be drawn in this case, it will be necessary to review the background circumstances and chronology of events leading up to the RIF. Ronald P. Kuzma, the Chief of the Fiscal Service at Bay Pines, described the training program for accountants in which appellant participated. He stated that the purpose of the program is to train individuals to serve as accountants within the Veterans Administration (VA) nationwide. By providing training for accountants, the agency both creates a pool of qualified people who can move into appropriate positions at any VA site, and encourages career devleopment. Ordinarily, special funding for the training program is channeled from the VA Central Office in Washington, D.C. to

sites such as Bay Pines. 1/ Trainees devote themselves exclusively to training activities. They do not generally engage in "productive" work. Those who complete the program successfully go on to work as accountants throughout the VA (See also Appellant's Exhibit 7).

Appellant entered the training program as a GS-5 in August 1980.2/ He was promoted to GS-7 approximately one year later. On or about September 8, 1981, the agency announced

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1/Section 2.03(b) of an agency publication entitled "Training Program for Accountants" (Appellant's Exhibit 7) provides, "stations may establish intern positions without approval of Central Office if accomplished within available funds and if there are exisiting or anticipated vacancies at the station for utilization of the employee upon completion of training." Appellant did not occupy such a position. Funding for his position came initially from Central Office.

2/Appellant believes he should have been hired as a GS-7, but Board does not have jurisdiction to review the agency's decision to hire him instead as a GS-5. Entry into the program may be at either the GS-5 or the GS-7 level. See Appellant's Exhibit 7.

that the position of Accountant Trainee was vacant. At the time, apellant had completed his year of training. It was expected that he would soon transfer to a regular accountant position at some other agency facility. Mr. Kuzma selected Bernard J. Rubenstein for the trainee vacancy, and Mr. Rubenstein began working in the Fiscal Service on or about September 20, 1981. 3_/

By the end of September, 1981, appellant had not yet secured another position, but the special funding for his trainee position was about to expire. Mr. Kuzma sought and obtained "station funding" so appellant could remain in the Fiscal Service at Bay Pines while he continued looking for a position elsewhere. In other words, appellant's salary was no longer paid out of special training funds allocatd by the Central Office, but rather out of local funds. Mr.

3_/When selected for the trainee position, Mr. Rubenstein was working for the agency as a Medical Technologist, GS7. Therefore, unlike appellant, he entered the training program as a GS-7. Shortly after the reduction in force under appeal, Mr. Rubenstein was offered a position at the VA Medical Center in Austin, Texas. He is no longer at Bay Pines.

Kuzma indicated that, at his request, the local funding for appellant's position was extended periodically.

Mr. Kuzma testified that appellant's duties changed during his second year of employment. Rather than engage only in training activities, he assumed respnsibility for certain accounting tasks and was also asked to do some internal audit work. According to Mr. Kuzma, however, appellant was still carried on the rolls as a trainee. Appellant asserts that after the first year he was not a trainee any more. This point will be discussed further below. Whatever appellant's status, it should be noted that his performance was entirely satisfactory.

After a number of months (the exact date is unclear from the record), the Medical Center Director refused to authorize the expenditure of any more local funds for appellant's position. The reduction in force under appeal ensued.

Vernon E. Rochester, the agency's Personnel Officer, testified that RIF procedures were invoked in this case because of both a lack of work and a shortage of funds.

Under 5 C.F.R. para. 351.201(a), either a lack of work or a shortage of funds (or other specified conditions) may trigger a reduction in force.4_/ Mr. Rochester and Mr. Kuzma indicated that there was a lack of work for GS-7 level accountants in the Fiscal Service in the sense that there was not enough GS-7 level work available to justify retaining a person trained to perform at that level (i.e., appellant), and that there was a shortage of funds in the sense that Central Office funding for one training slot (that held by appellant) had been cut off and local funds could no longer be used to support the position.

Appellant contends that there could not have been a lack of work in the Fiscal Service, because he was given ample work to do during his second year, and that there surely was not a shortage of funds because the agency was expanding and adding to its staff, not cutting back. Appellant argues,

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4_/A reorganization may also trigger a reduction in force. In closing argument, the agency's representative referred to a reorganization, but there is no evidence that a reorganization within the meaning of 5 C.F.R. para. 351.203(f) precipitated the RIF under appeal.

too, that the agency did not save any money by RIFing him because he was granted retained pay. For these reasons, appellant takes the position that the RIF action was unjustified and not taken in good faith. He has also suggested that the agency sought to protect Mr. Rubenstein at appellant's expense by hiring Mr. Rubenstein as a Accountant Trainee to save him from being RIFed from another job, even though appellant was already serving as an Accountant Trainee. Appellant sees this as further evidence of the Agency's lack of good faith.

The evidence of record established that both a lack of work and a shortage of funds did exist in this case. For the agency to retain appellant (or anyone else) who was fully trained, but give the trained accountant nonproductive trainee tasks to do, would certainly be pointless. Mr. Kuzma's testimony about the lack of sufficient work to occupy an additional GS-7 Accountant was credible and went essentially unrebutted.

Though there was no shortage of funds overall, there was a shortage of funds for Accountant Trainees. Both the central

office and the local center director had cut off the funds that had been used to support the trainee position appellant occupied. The situation may be an analogized to that in Proctor v. Government of the District of Columbia, 5 MSPB 466 (1981). In Proctor, special grant funding for the employee's office was exhausted, so his unit was abolished. The agency he worked for, the Government of the District of Columbia, of course continued to function. The Board found that under the circumstances RIF procedures were properly invoked.

The fact that appellant is receiving retained pay pursuant to 5 U.S.C. para. 5363 makes no difference. Employees who have been RIFed often receive retained pay. When an employee is reassigned to a new position following the abolishment of his or her original position, only the new position is occupied. By definition, the abolished position is no longer occupied. Where the agency formerly had two employees and had to pay two salaries, it is left with only one, and thereby realizes a saving.

The agency did have legitimate reason for invoking RIF procedures in this case. This is so even though neither

the underlying lack of work nor the shortage of funds was mentioned in the notice issued to appellant. See Cummings v. Department of Defense, 6 MSPB 178 (1981).5 /

Once the agency decided to conduct a reduction in force in the Fiscal Service, it established a retention register for GS-7 Accountant Trainees. The retention register shows Mr. Rubenstein, a nonveteran with career status, in retention subgroup IB and appellant, a veteran without career status, in retention subgroup IIA. See 5 C.F.R. para. 351.501. Technically, the agency decided to abolish one postion in the Accountant Trainee competitive level it had established. As a result, appellant and Mr. Rubenstein competed for the

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5 /That Mr. Rubenstein may have been facing a reduction in force when he was selected as an Accountant Trainee in 1981 is irrelevant. His selection occurred almost one year before the agency conducted the RIF which affected appellant. The selection of Mr. Rubenstein cannot be construed as part of a scheme to get rid of appellant. At the time, th agency could not have foreseen that appellant would still be at Bay Pines so many months later.

surviving, central office-funded trainee position. The agency released appellant from the competitive level because, in accordanc with 5 C.F.R. para. 351.602, he had lower retention standing than Mr. Rubenstein.

Appellant raised two main challenges to the agency's action. First, he points out that he had a "career" appointment with the United States Postal Service in 1968. See Appellants's Exhibits 4 and 5. This may be interpreted as an argument tha he should have been in retention group IA instead of IIA, which would have given him higher retention standing that Mr. Rubenstein and would have enabled him to survive the RIF.

Initially the ageny hired appellant as a temporary employee. Approximately three months later, his status was changed to "reinstatement-career conditional" because, in light of his employment with the United States Postal Service in 1968, he was found eligible for reinstatement. The Federal Personnel Manual (FPM), chapter 315, subchapter 4-6 (April 27, 1982), provides that upon reinstatement as former federal employee becomes a career-conditional employee unless he or she has

met the service requirement for career tenure. FPM chapter 315, subchapter 2-4a (July 21, 1982), states that one must have three years of substantially continuous creditable service in order to attain career tenure. At the time of the reduction in force under appeal, appellant had been with the agency for approximately two years. It appears that he worked for the postal service between July and December, 1968, for a total of no more than six months. Even disregarding the long break between his employment with the Postal Service and his employment with the agency, it is apparent that he had not completed a total of three years of federal service at the time of the RIF. He was therefor not entitled to career status. The Postal Service may have labeled his appointment a "career" appointment but this in itself did not give him permanent career status which can only be attained after the required amount of service has been completed. Appellant was properly categorized as a career-conditional employee and was properly placed in retention group IIA.

Appellant's second challenge concerned the agency's definition of his competitive level. If he and Mr. Rubenstein

were correctly placed on the same retention register, then he (appellant) was properly released from the accountant trainee competitive level before Mr. Rubenstein because he had lower retention standing. Appellant testified, however, that unlike Mr. Rubenstein he was not trainee after September 1981.6_/ This is another way of saying that he should not have been includedin the same competitive level, and on the same rtention register, as Mr. Rubenstein, who was definitely still a trainee.

A competitive level consists of:

> All positions in a competitive area and in the same grade or occupational level which are sufficiently alike

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6_/To bolster his testimony, appellant attempted to introduce documentary evidence after the hearing, showing that he was not a trainee during his second year of employment. Appellant failed to establish that the documents offered were "not readily available prior to the close of the record" in his case. Therefore, pursuant to 5 C.F.R. para. 1201.57(c), the documents cannot be received into evidence. They do not add significantly to appellant's testimony in any event.

> in qualification requirements, duties, responsibilities, pay schedules, and working conditions, so that an agency readily may assign the incumbent to any one postion to any one of the other positions without changing the terms of his appointment or unduly interrupting the work program.

5 C.F.R. para. 351.403(a). Separate competitive levels must be established for employees in formal training programs. 5 C.F.R. para. 351.403(b)(1)(vii). Mr. Kuzma testified that appellant was still considered a trainee during his second year of employment, but he also indicated that appellant no longer performed the work of a trainee. By then, too, it is not clear that appellant could still be considered the incumbent of a formally designed trainee or developmental position in accordance with 5 C.F.R. para. 351.701(e). Mr. Kuzma had obtained clearance to place him in a "temporary over-ceiling position." It was therefore incorrect for the agency to place appellant in the same competitive level with Mr. Rubenstein.

Even if the agency had placed appellant in a separate competitive level, he would still have been RIFed. Because he was the only person in the Fiscal Service who had completed

the training program and been assigned a combination of accounting and audit duties, he would have been the only one in this particular competitive level.7_/ It would have been within the agency's discretion to abolish the unique position occupied by appellant without abolishing the Accountant Trainee position (in a separate competitive level) occupied by Mr. Rubenstein. See Griffin v. Department of Agriculture, 2 MSPB 335 (1980). At that point, appellant would have been released from his one-person competitive level, just as he was when the agency conducted its RIF using the incorrectly defined two-person competitive level. Where it is apparent from the record that an "Agency's correct definition of the competitive level would have made no difference affecting the employee's substantitive rights, the agency's action in such a case will not be reversed on the basis of such an error." Foster v. Department of Transportation, 7 MSPB

7_/It is not clear whether there were any regular GS-7 accountants in the Fiscal Service at Bay Pines, but even if there were, any such accountant(s) would belong in a competitive level distinct from appellant's because appellant was in a one-of-a-kind position.

707,709(1981). There is, incidentally, nothing inherently wrong with a reduction in force - like this one - which affects only one person Cf. Farmer v. Department of Transportation, MSPB Docket No. BN03518110114 (September 28, 1982) (RIF following reorganization affecting only one employee may still be bona fide).

Once appellant was released from his competitive level the agency was required, under 5 C.F.R. para. 351.603, either to assign him to a position for which he was qualified, furlough him, or separate him. The agency chose to assign appellant to a vacant Accounting Technician position, GS-5, for which he was qualified.8_/ The accounting technician position was available because Bay Pines as a whole was in an expansion mode. As required under 5 C.F.R. para. 351.701(a), appellant was qualified for the accounting technician position. He does not contend that a "better"

8_/Pursuant to 5 C.F.R. para. 351.201(b), the agency was not required to fill this vacancy in the course of the RIF, but it was permitted to do so.

(i.e., higher grade, GS-7) position to which he could have been assigned was available in the competitive area. In the absence of any challenge in this regard, the limited evidence in the record may still be considered sufficient to meet the agency's burden of proving that it satisfied appellant's assignment rights. See Hishikawa v. Department of Agriculture, 6 MSPB 428 (1981); Losure v. Interstate Commerce Commission, 2 MSPB at 366 n.6. 9/

To recapitulate: the agency had a legitimate reason for invoking RIF procedures in this case, appellant was properly reached for release from his competitive level even though the competitive level was not correctly defined, and, once released, appellant was appropriately reassigned to a vacant position. Notwithstanding the foregoing, reversal of the RIF action will be required if appellant prevails on

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9/If appellant had wished to assert assignment rights to any other postiions(s), it would have been incumbent upon him to identify the postions(s) he believed himself qualified for. See Aronson v. Department of the Navy, 4 MSPB 379 (1981).

his affirmative defense of race discrimination. 5 U.S.C. paras. 2302(b)(1)(A), 7701(C)(2)(B), 7702. He bears the burden of proving discrimination.

In Stewart v. U.S. Postal Service, MSPB Docket No. DA07528010154 (November 15, 1981), the Board noted that in cases like this one, where the agency has met its burden of proof, it is generally unnecessary for the presiding official to make a finding on the existence of a prima facie case of discrimination. Instead, the discrimination issue may be resolved by determining whether the appellant has shown that the agency's articulated reasons for its action were a pretext for discrimination. There is no evidence of pretext here. Appellant has established little more than that he is black while Mr. Rubenstein, Mr. Kuzma, and Mr. Rochester are all white, His attorney argued in closing that race discrimination is the only possible explanation for the entrie chain of events which led up to the RIF action

under appeal. There is simply no evidence to support this assertion.10_/

The agency has proved its case by a preponderance of the evidence, and appellant has not carried his burden of proving discrimination. Therefore, the RIF action under appeal will be affirmed.

10_/Whether race discrimination entered into appellant's non-selection for positions at other VA failities is not an issue to be decided in this appeal, which concerns only the reduction in force. The Board does not have jurisdictin over claims of nonselection and failure to promote in any event, see Humphries v. Veterans Administration, 3 MSPB 80 (1980), but employees who believe they have been discriminatd against in hiring may pursue their claims through EEO procedures and/or by reporting suspected prohibited personnel practices to the Board's Special Counsel for investigation in accordance with 5 U.S.C. para. 1206.

DECISION

Appellant's demotion under reduction in force procedures is AFFIRMED.

NOTICE

This is an initial decision. It will become a final decision of the Merit Systems Protection Board on August 23, 1983, unless a petition for review is filed with the Board or the Board reopens the case on its own motion.

Any party to the proceeding, the Director of the Office of Personnel Management, and the Special Counsel may file a petition for review. The Director may request review only if he/she is of the opinion that the decision is erroneous and will have a substantial impact on any civil service law, rule, or regulation under the jurisdiction of the OPM. The board may grant a petition for review, after providing an opportunity for response by other parties, when it is established that:

(1) New and material evidence is available that, despite

due diligence, was not available when the record was closed; or

(2) The decision of the presiding official is based on an erroneous interpretation of statute or regulation.

All petitions for review shall set forth objections to the initial decision, supported by references to applicable laws or regulations, and with specific reference to the record. The petition for review must be filed with the Secretary of the Merit Systems Protection Board, 1120 Vermont Avenue, N.W., Washington, D. C. 20419, no later than the date shown above.

The appellant has the right to petition the Equal Employment Opportunity Commission to consider the Board's final decision on the issue of discrimination. The appellant also has the right to file a civil action under the anti-discrimination laws in any appropriate United States district court. Either a petition or a civil action may be filed, but not both, no later than 30 days after the Board's decision becomes final. Appellants who choose to file an action in a district court also have the right to request

the court to appoint a lawyer to represent them, and to request that prepayment of fees, costs or security be waived.

Except for actions filed under the antidiscrimination laws, pursuant to 5 U.S.C. para. 7703 (B)(1) 11_/, the appellant has the right to seek judicial review of the Board's final decision on his appeal. A petition requesting such review must be filed with the U.S. Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439, no later than 30 days after appellant's receipt of the Board's final order or decision.

For the Board:

CLAUDIA TESORO
Presiding Official

11_/As modified by para. 127 of the Federal court Improvement Act of 1982, to be codified at 28 U.S.C. para. 1295(a)(9).

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT
717 MADISON PLACE, N. W.
WASHINGTON, D. C. 20439

GEORGE E. HUTCHINSON
CLERK

Telephone: 633-6550
Area Code 202

April 1, 1985

Mr. Willie H. Christian
707 N. Jefferson Avenue
Clearwater, Florida 33515

RE: Willie H. Christian v. Veterans Administration
Appeal No. 84-1290

Dear Mr. Christian:

The Court has considered the motion to vacate the mandate issued in this appeal pursuant to the decision and opinion of March 6, 1985, and has today denied the motion.

Any further review of the case must be by means of a petition for writ of certiorari to the U. S. Supreme Court

which must be filed within 90 days of the Court's decision on February 12, 1985.

Very truly yours,

/s/

GEORGE E. HUTCHINSON

cc: Ronald A. Schechter, Esq.

GEH:bam

UNITED STATES SUPREME COURT
WASHINGTON, D. C. 20543

Willie H. Christian,)
)
Petitioner,)
)
v.)
)
Veteans Administration,)
)
Respondent.)

CERTIFICATE OF SERVICE

I hereby certify that on this date I have served a true and correct copy of Petition for Writ of Certiorari and Appendix causing a copy thereof to be served upon the following counsel of record:

Solicitor General
Department of Justice
Washington, D. C. 20530

WILLIE H. CHRISTIAN
707 North Jefferson Avenue
Clearwater, FL 33515
(813) 461-3433

DATED: May 8, 1985